

LOWER DUWAMISH WATERWAY SITE
MEMORANDUM OF UNDERSTANDING BETWEEN
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
AND THE WASHINGTON DEPARTMENT OF ECOLOGY

April 2002

I. PURPOSE

On September 13, 2001, the Lower Duwamish Waterway Site (Site) was placed on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) National Priorities List (NPL), (65 Fed. Reg. 75179-01). This Memorandum of Understanding (MOU) is entered into between the United States Environmental Protection Agency (EPA) and the Washington Department of Ecology (Ecology), (collectively, "the Parties"). Through this MOU, the Parties intend to provide a framework for coordination and cooperation in the management of the Site to optimize federal and state available resources to:

- A. Implement the Site Administrative Order on Consent (AOC) and attached Remedial Investigation/Feasibility Study (RI/FS) Statement of Work (SOW) (signed December 20, 2000), and future administrative orders or consent decrees for the Site, consistent with the requirements of CERCLA, 42 U.S.C. §§ 9601 *et. seq.*, the National Contingency Plan (NCP), 40 C.F.R. Part 300, and the Washington State Model Toxics Control Act (MTCA) (Chapter 173-340 WAC), and/or other federal and state laws as applicable.
- B. Identify sources of contamination to the Lower Duwamish Waterway and implement source control measures as necessary.
- C. Integrate and coordinate efforts by the Parties with Natural Resource Trustees and affected Native American Tribes to achieve protective cleanups and minimize residual ecological risks at the Site to ensure viable restoration activities.
- D. Inform and seek input from the affected community on the remedial investigation, human health and ecological risk assessments, and potential remedies for the site or portions of the site.
- E. Provide procedures for resolving disputes between the Parties regarding work at the Site, including implementation of respective Lead and Support Agency roles for the upland source control and sediment portions of the Site.
- F. Clarify for all concerned, including the public, Natural Resource Trustees, and Potentially Responsible Parties (PRPs)/Potentially Liable Parties (PLPs), the Lead and Support Agency roles of EPA and Ecology.

This MOU is consistent with the March 2, 2000 “Ecology/EPA Agreement on Roles and Responsibilities at NPL Sites”, and subsequent updates to that agreement. The Lower Duwamish Waterway site is an enhanced involvement site, and this MOU serves the purpose of a site-specific scope of work for an enhanced involvement site, as defined by the Ecology/EPA agreement.

II. GENERAL AGREEMENTS

The Parties agree to:

- A. Work together, communicate frequently, and resolve disagreements as quickly as possible.
- B. Speak with one voice to outside parties to the extent possible.
- C. Keep the public informed.
- D. Coordinate with Natural Resource Trustees and affected Native American Tribes.
- E. Keep to schedules in AOC and SOW to the extent possible.
- F. Keep each other informed of latest scientific information related to the project, and decisions, being made on other sites which may be relevant to the project.
- G. Coordinate with other programs in their agencies (such as Resource Conservation and Recovery Act [RCRA] and Water Quality) that are responsible for cleanup, source control, or Total Maximum Daily Load (TMDL) policy and implementation relevant to the Site.

III. SOURCE CONTROL ACTIVITIES

- A. Ecology is designated Lead Agency for Source Control Activities. EPA will be the Support Agency.
- B. Ecology, with support from EPA, will develop a Source Control Strategy to be completed within 60 days of execution of this MOU. The strategy will define a process for identifying and managing potential sources of contamination, including but not limited to:
 - Hazardous substance releases at upland sites,
 - Storm water and other National Pollutant Discharge Elimination System (NPDES)-permitted discharges,
 - Upland sources of sediment contamination and upstream sources to storm water,
 - Discharges to waters of the State that are not currently permitted under NPDES or other State or federal water quality authority, and
 - Contaminated fill and wood debris.

- C. Ecology, with support from EPA, will develop a Source Control Plan to be completed within 180 days of the execution of this MOU. The Source Control Plan will provide detail based on the Source Control Strategy. Ecology will provide a schedule for all source control activities in the Source Control Plan. The source control schedule will be coordinated with the schedule for the RI/FS and early actions to the extent feasible. Ecology, in consultation with EPA, will update the Source Control Plan and source control schedule annually.
- D. Ecology will propose and implement source control actions, negotiate agreements, and inspect facilities. Ecology will submit proposed source control decisions to EPA, including data, maps, cleanup reports, and other documentation to support Ecology's decisions. EPA will provide review and comment on key proposed source control decisions. All work will be done within a timeframe determined by the agencies to be compatible with the work schedule for the Site. Such Ecology decisions will include:
- Determination whether an upland site is a current source of contamination to the river and sediments,
 - Selection of a source control measure and schedule for its implementation,
 - Determination that a source control measure has been satisfactorily performed, and documentation in the source control completion reports.
- E. Ecology will prepare and provide a biannual report to EPA summarizing the status of Ecology source control activities. Key information to be summarized will include:
- Sites inspected,
 - Sources identified,
 - Source control measures implemented (including the results of any long-term monitoring),
 - Status of ongoing source control measures,
 - Completed source control measures, and
 - Adherence to source control schedule.
- F. Ecology will coordinate with EPA to ensure that any EPA-led actions (such as RCRA Corrective Actions) meet source control objectives for the Site.
- G. Ecology will coordinate with King County, the City of Seattle, and other agencies as appropriate in order to integrate ongoing County and City activities relevant to source control. County and City source control actions may include inspections, cleanup agreements, modeling, and other activities. Ecology will review relevant County and City source control activities to determine their sufficiency, and work with the City and County to take additional source control actions where needed. Ecology will include City and County actions in status reports to EPA.

- H. Ecology will implement source control activities using appropriate state authority, including but not limited to MTCA, the contaminated site voluntary cleanup program, Water Quality enforcement orders, NPDES permit modifications, and appropriate interagency agreements. Ecology will provide draft agreements or orders to EPA for review. EPA agrees to review documents in the timeframe requested by Ecology, or provide a timely request for an extension.
- I. EPA will review and concur on:
- Source control strategy and plan,
 - Source control status reports,
 - Proposed source control actions,
 - Source control completion reports, and
 - Determination of whether source control actions are sufficient to meet the goal of preventing recontamination of Lower Duwamish Waterway sediments.
- J. Ecology or EPA may propose that EPA provide enhanced technical support or assume the Lead Agency role for any discrete facility(s) or portion(s) of Source Control activities at any time. Such decisions would be made by EPA, with concurrence by Ecology.

IV. SEDIMENT RI/FS ACTIVITIES

- A. EPA is designated Lead Agency. Ecology will be the Support Agency.
- B. EPA will be the lead for communication with the Lower Duwamish Waterway Group, Natural Resource Trustees, and Native American Tribes on matters related to the RI/FS. EPA will distribute documents, and request, collect and collate comments, and provide them to the Lower Duwamish Waterway Group.
- C. Ecology will review documents produced by the Lower Duwamish Waterway Group under the AOC in the timeframe requested by EPA, or will provide a timely request for an extension. Ecology may choose not to review, or provide a cursory review, of certain documents. In its review, Ecology will identify comments critical for compliance with MTCA or the Washington State Sediment Management Standards. EPA will discuss any proposed omission or modification of "critical" comments with Ecology. EPA will use its discretion to incorporate Ecology's other comments in their comment letter, and will discuss modifications or omissions to the extent possible. EPA will provide a draft comment letter for a brief (1-day) review by Ecology prior to submitting comments to the Lower Duwamish Waterway Group.
- D. The overall cleanup plan for the Site will be documented in a Record of Decision (ROD) pursuant to CERCLA and the NCP (40 CFR Part 300). In accordance with the procedures set forth in the Ecology/EPA Agreement, EPA will brief Ecology and seek their input on the proposed plan. EPA will brief Ecology on any changes to the proposed remedy based on public comment and request Ecology's concurrence on the Record of Decision.

- E. EPA and Ecology will consult and determine on a case-by-case basis which agency shall be Lead Agency for Early Action and Long-Term Action cleanups. Either agency may propose that the other agency provide enhanced technical support or assume the Lead Agency role for any discrete portion(s) of a cleanup activity at any time. Both EPA and Ecology would concur on any decisions to provide enhanced technical support or assume the Lead Agency role.

V. COORDINATION

- A. EPA and Ecology will assign RI/FS Remedial Project Managers (RPM) to oversee the Remedial Investigation and Feasibility Study and early and long-term remedial actions in the Lower Duwamish Waterway. EPA and Ecology will assign Source Control Project Managers (SCPM) to oversee the investigation and remediation of upland contamination and other Source Control activities. The EPA RPM will serve as the main point of contact for Ecology, the Tribes, and Natural Resource Trustees on matters related to the RI/FS and in-waterway remedial actions. The Ecology SCPM will serve as the main point of contact for EPA, the Tribes, and Natural Resource Trustees on matters related to Source Control. Ecology's present lead RI/FS RPM and SCPM is Rick Huey. EPA's present lead RI/FS RPM is Allison Hiltner and EPA's present lead SCPM is Kris Flint.
- B. The EPA and Ecology RI/FS RPMs and SCPMs will meet frequently to discuss and keep each other informed of the status of RI/FS and source control activities, respectively.

VI. TRIBAL CONSULTATION

- A. EPA and other federal agencies have a unique legal relationship with tribal governments as set forth in the United States Constitution, treaties, statutes, executive orders, and court decisions. Federal policies instruct EPA to have regular and meaningful consultation with Indian tribal governments when developing policies and regulatory decisions on matters affecting their communities and resources, including Executive Order 13175 on Consultation and Coordination with Indian tribal Governments, effective January 6, 2001; President Clinton's memorandum of April 29, 1994 on Government-to-Government Relations with Native American tribal Governments; and the EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 8, 1984.
- B. Nothing in this MOU is intended to preclude separate government-to-government consultation between a signatory Tribe, the State, and EPA or other federal agencies pursuant either to federal Indian law and policies, or any separate government-to-government consultation agreement(s) between EPA and a signatory Tribe.

VII. COMMUNITY INVOLVEMENT

- A. Community involvement will be a joint EPA/Ecology lead. Ecology and EPA will coordinate in-water and upland public outreach and involvement, including the drafting of a Lower Duwamish Waterway Site Community Involvement Plan, and coordination with the Site community advisory group.
- B. For all community involvement activities, the EPA Community Involvement Coordinator (CIC) and the Ecology RPM will be the primary contacts.
- C. The CIC is responsible for community involvement activities required under CERCLA, and the Ecology RPM is responsible for activities under MTCA. EPA is lead for managing the site Technical Assistance Grant (TAG). Ecology is lead for managing the site Public Participation Grant (PPG).
- D. EPA and Ecology will coordinate with each other before initiating any press releases and before providing fact sheets or other materials for external review for community involvement purposes. EPA and Ecology will obtain the consent of the other agency before providing press releases to outside parties for review and comment.
- E. EPA/Ecology sponsored public meetings will be joint activities.
- F. The CIC and Ecology RPM will coordinate their agencies' participation in community advisory group and other meetings. The CIC and Ecology RPM will inform each other of all meeting requests.
- G. EPA will maintain the mailing list for fact sheets and will mail the fact sheets, unless some other agreement is made in the future.

VIII. PRP/PLP SEARCH

- A. EPA will be the lead agency for identifying PRPs for the Lower Duwamish Waterway cleanup and any early actions for which EPA is designated the lead agency. Ecology will act in a support role.
- B. Ecology will be the lead agency for identifying PLPs for source control actions and any early actions for which Ecology is designated the lead agency. EPA will act in a support role.
- C. Both agencies will share any information that would be helpful in identifying PRPs/PLPs, including information gathered as part of the RI/FS and source control activities.

IX. DISPUTE RESOLUTION

- A. The Parties acknowledge that it is in their respective best interests and in the interest of advancing the remedial process to identify disputes between them as soon as possible and attempt to resolve them.
- B. The Parties will make a good faith effort to resolve any conflict or disagreement informally by meeting to discuss and consider possible solutions. If the dispute cannot be resolved at the staff level, the dispute will be elevated up the appropriate management hierarchy of each of the respective Parties.
- C. If the Parties continue to disagree, the matter will be elevated to the EPA Office of Environmental Cleanup Associate Director and the Ecology Toxics Cleanup Program Manager, who will resolve the matter or decide the appropriate forum or means of ultimate resolution.

X. CONFIDENTIALITY

- A. The Parties recognize that in order to effectively and efficiently exercise their authorities concerning the Site, their counsel, employees, and consultants may exchange documents and information subject to attorney-client privilege, attorney work product, and other forms of privilege. The Parties intend to keep confidential information shared under this MOU confidential to the extent permissible under applicable law. Also, to avoid interference with a potential enforcement proceeding in which the parties have a common interest, the parties will similarly protect from disclosure any law enforcement records exchanged in anticipation of litigation. The Parties further agree to protect these privileges, to the full extent permissible under applicable law. This provision shall remain in effect after this MOU terminates.
- B. Whenever sharing information deemed confidential, the Party shall clearly mark any information to which it asserts a privilege as “Privileged and Confidential Information – Do Not Release Without Authorization.” The Party receiving information so marked agrees not to release, or allow to be released, such information to a non-party, to the extent permitted by law. The Parties agree that failure to so mark information developed or shared under this MOU does not preclude the Parties from asserting the protections under the Freedom of Information Act or Washington State law, or from asserting privileges and exceptions in seeking to protect the information from discovery.

XI. GENERAL PROVISIONS

- A. EPA and Ecology will provide each other advance notice of any contemplated response enforcement or cost recovery action concerning the Lower Duwamish Waterway, and coordinate with and assist each other in such actions as appropriate.
- B. Ecology reserves the opportunity to request federal funds for state-lead removal actions and to seek cost-share credit for state-financed remedial actions. Nothing in this MOU waives or supersedes any state right under CERCLA regarding applicable, or relevant and appropriate requirements (ARARs), ROD concurrence, and consent decree participation.

XII. AUTHORITY AND APPLICABILITY

- A. Each Party has authority to enter into this MOU. EPA and Ecology have express statutory authority to respond to releases of hazardous substances related to the Site.
- B. This MOU is effective upon signature by both EPA and Ecology. Any Party may withdraw from this MOU upon thirty (30) days written notice. This MOU will be regularly reviewed by the Parties and may be modified by written agreement by the Parties.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY: _____
Michelle Pirzadeh
Office of Environmental Cleanup
Associate Director
_____ Date

WASHINGTON STATE DEPARTMENT OF ECOLOGY

BY: _____
James J. Pendowski
Toxics Cleanup Program
Program Manager
_____ Date